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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-749

ART THEATRE GUILD, INC., and SHERPIX, INC.,
Petitioners,

vs.

LARRY E. PARRISH, THOMAS F. TURLEY, JR., ET AL.,
Respondents.

BRIEF OF RESPONDENT LARRY E. PARRISH IN OPPOSITION

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OPINIONS BELOW

On September 24, 1974, United States Court of Appeals for the Sixth Circuit rendered an opinion in the case of *Art Theatre Guild, Inc., and Sherpix, Inc.*, v. *Larry E. Parrish, et al.*, 503 F.2d 133 (6th Cir., 1974). The action taken by the Court of Appeals below appears as follows at 503 F.2d p. 137: (See also Petition Appendix A, p. 27)

> "The case is affirmed but remanded to the District Court to supervise the process of permitting, if necessary, the appropriate plaintiff-appellant to make copies of the seized films without destroying the government's right to retain the evidence it deems necessary for its case, and to determine as provided in the trial court memorandum if any material seized 'is not relevant and necessary evidence to the prosecution.' "

The entire decision of the Court of Appeals below appears as Appendix A in the Petition pp. 19-27.

The Memorandum Decision of the United States District Court for the Western District of Tennessee appears in its entirety as Appendix C in the Petition pp. 30-42. This decision was rendered after the filing of a Complaint by Petitioners naming Respondent, among others, as an individual and in his capacity as Assistant United States Attorney. The United States is not named as a party-defendant. The Complaint filed seeks money damages from the Respondent alleging illegal and unconstitutional exercise of the powers of his office with the intent of effecting nationwide censorship of a motion picture entitled "School Girl", hereinafter referred to as "School Girl". In addition, Petitioners sought injunctive relief requiring the return by Respondent of several copies of "School Girl" and the master negative of that film which had been seized by execution of search warrants at various locations throughout the United States. Additionally, Petitioners sought to obtain injunctive relief against Respondent to prohibit any future actions the designed results of which would be additional seizures of "School Girl".

The district court conducted a hearing concerning the injunctive relief sought by Petitioners and rendered the Memorandum Decision, appearing as Appendix C in the Petition, and concluded as follows:

> "In summary the Court concludes that the application for a preliminary injunction should be denied. The cause will be retained for further proceeding including a hearing on the Motion to Dismiss or Motion for Summary Judgment after responses are made."

It is from these rulings below that Petitioners seek review and reversal of the decisions below rendered.

JURISDICTION

Respondent does not question the subject matter jurisdiction set forth in the Petition but challenges the appealability of the decision of the district court in that it is an interlocutory appeal of a criminal case *in esse*, and governed by *DiBella* v. *United States*, 369 U.S. 121 (1962).

QUESTIONS PRESENTED FOR REVIEW

Petitioners set forth no question which in fact is raised by the proceeding below. The real questions presented are as follows:

1. Did the prayer for money damages from Respondent in Petitioners' Complaint invest the district court with any power or authority?

2. Does *DiBella* v. *United States*, supra, prohibit an appeal from the decision of a district court denying return to persons who are defendants in a pending criminal case of items which are evidence in that criminal case?

3. Is material adjudicated obscene by a district court, after a full adversary hearing on the issue, subject to any protection under the First Amendment?

4. Does the Constitution prohibit or restrict prosecutions for violation of Title 18, United States Code, §371 for conspiring to distribute obscene materials in interstate commerce "throughout the United States" in violation of Title 18, United States Code, §1462?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, First Amendment;
2. Constitution of the United States, Article I, §8, Cl. 3, the Commerce Clause;
3. Title 18, United States Code, §371;
4. Title 18, United States Code, §1462;
5. Title 28, United States Code, §1331.

COUNTER-STATEMENT OF THE CASE

On May 26, 1972 the district court entered an Ex Parte Order To Show Cause which ordered the possessors of "School Girl" to bring the film at 9:30 a.m. on May 30, 1972 to the district court and to come at that time and show cause, if any there be, why the film should not be adjudged obscene and a search warrant issue for its seizure. The film was then in the possession of Film Transit, Inc., in the process of being shipped from Memphis to New Jersey. In addition to the possessors, notice was given by personal service of the Order To Show Cause on persons in charge of the theater in Memphis where the film had just completed an eleven-week playdate and on persons in New Jersey in charge of the addressee company where the film was destined for shipment.

In the Memorandum Decision entered December 1, 1972, included in its entirety as Appendix C of the Petition, the district court attempts to summarize all of the

proceedings prior to December 1972. As seen on p. 31 of the Petition the district court observes:

> "On that ex parte application the Court entered a show cause order whereby the Marshal . . . was directed to obtain possession of the film and bring it to this Court. . . ."

This is an inadvertent factual misstatement. Reference to the Order itself, which is included as Appendix AA to this Brief, shows that the only thing that the Marshal is ordered to do is effect personal service, as above specified, and to seal the film. Further, reference to the court reporter's recordation of the proceedings on May 30, 1972 reveals that the possessors of the film actually produced it in district court in its sealed condition. This further is reflected by the Order of Custody entered by the district court on June 2, 1972 which states that the film was produced "in accordance with this court's Order."

Mr. Simpson from Film Transit, Inc., on May 30, 1972, physically transported and produced the film in the district court. At its production in open court Michael Pleasants, Esq., now representing Petitioners in the instant proceedings, appeared in court and demanded return of the film but refused to answer when asked by the district court whose interest he represented. The district court, then and there, viewed the film and on motion of Mr. Pleasants withheld an adjudication as to its obscenity in order to allow an opportunity for anyone having interest in the film to assemble proof on the issue and present it to the district court. Though Mr. Pleasants was present, upon inquiry by the district court as to whether any person would subject themselves to the in personam jurisdiction of the district court in handling the film, no one agreed and the district court, having no alternative, retained possession of the film to prevent anyone from divesting the

district court of control over the res of the controversy. The United States Marshal was instructed to hold the film for and at the direction of the district court.

On application of Petitioner, Art Theatre Guild, Inc., the continuation of the adversary proceeding concerning the film was continued by the district court on two separate occasions. Prior to the recommencement of the adversary hearing, motions were made to dismiss the action and return the property. Simultaneously a Grand Jury investigation was commenced which was nationwide in scope and included substantial testimonial evidence as well as the production of documents.

Finally, on August 28, 1972, the adversary hearing was reconvened and consumed three days of testimony from five "expert" witnesses testifying at the behest of Petitioner, Art Theatre Guild, Inc., and two psychiatrists testifying at the behest of the United States. At the conclusion of this adversary hearing, on August 31, 1972, the district court orally found the film obscene and entered a written Judgment On Obscenity on September 15, 1972. The denial of Petitioner's motion for return of property and the district court's Judgment On Obscenity were the subject of appeal to the Court of Appeals and in *United States* v. *Two Cartons Containing One Motion Picture Film Entitled "School Girl"*, CCA No. 72-1972 (6th Cir., May 10, 1973) the Court of Appeals entered an order dismissing the appeal as an attempt to perfect an interlocutory appeal in a criminal matter.

On September 11, 1972, the federal Grand Jury in Memphis returned a one-count indictment naming as defendants, Art Theatre Guild, Inc., Petitioner here, and one of its employees, charging a violation of Title 18, United States Code, §1462, relating to the shipment of the film to Memphis. However, the Grand Jury investigation con-

tinued, including the issuance of numerous subpoenas. Among those were several subpoenas to various persons and corporate entities requiring them to bring prints and negatives of "School Girl", among other things, from various places throughout the nation. Before the return date on those Grand Jury subpoenas, on September 28, 1972, Petitioners filed as a "civil" action a Motion For Preliminary Injunction in an effort to enjoin enforcement of those subpoenas. Petitioners claimed their standing by the assertion that they owned all of the prints and negatives. The district court treated this Motion For Preliminary Injunction as a Motion to Quash Subpoenas and conducted a hearing on October 6, 1972. This motion was stringently opposed by the United States, but the district court quashed, at that time, the relevant parts of the subpoenas. The district court attempted to ameliorate the consequences of its ruling by inclusion of restrictions on record keeping in connection with the various prints of the film. The district court in its Memorandum Decision of December 1, 1972 attempted to explain the import of those restrictions as follows and found in the Petition, Appendix C, p. 33:

> ". . . and directed that the persons and firms who were served with subpoenas should retain in their actual or constructive possession any prints, negative or positive . . . and not alter or destroy any copy of the film. Those persons and firms were also directed to keep a complete record of where the film was kept or sent so that the whereabouts of copies of the film could be determined for production of the film upon order of the Court."

The United States contended that these restrictions were unenforceable, unworkable and afforded absolutely no protection for the preservation of extremely important evidence of the crime under investigation. In the first

place the subpoenaed persons were not even parties to the proceeding. The Petitioners there claimed their standing to object on the basis of their ownership of the film. They had not been served with subpoenas. Thus, it is difficult to conceive how anything done by the district court under those circumstances could bind or require action by those directed to act. In the second place, even if those persons were bound, the restriction only requires that they keep records concerning where "they" send the film. Thus, "they" could send the film to their wife who would not be required, under any stretch of the imagination, to keep any record of anything nor would any subsequent possessor. Thus, the chain of possession is lost. Finally, what the district court did was to order persons to prospectively keep and produce, "on order of the court", records the sole purpose of which are to provide incriminating evidence against them. None of these observations take into account the opportunity of loss, theft, deterioration by normal wear and a host of other "innocent" reasons which might account for the evidence no longer being available. The more numerous such "innocent" reasons the more difficult to detect a foul reason. The restrictions envisioned do not take into account the evidentiary value of the films being seized or found in the precise location where they were in that exact condition in relation to the condition of the containers in which they are found, i.e., the containers normally have some evidence on them of all prior shipments. Further the restrictions lose sight of how those particular films in their separate and precise location in their then existing condition relates to other records independently kept, which were obtained during the investigation. It must be kept in mind that the crime in question is not a simple substantive case based primarily on direct evidence, instead, it is a conspiracy case and, as every conspiracy is, is based in large part on circumstan-

tial proof where each separate fact, and its unique relation to every other, is so vitally important. In the Memorandum Decision of the district court, it attempted to explain why it quashed the subpoenas. This explanation can be found in the Petition, Appendix C, p. 39. There the district court explained that "at the time" and "at that stage of the investigation" it was unable to perceive sufficient grounds to authorize the production of the film. By the district court's subsequent action in denying the return of the copies seized, it is implicit that the district court's initial impression subsequently was changed.

Prior to the hearing on October 6, 1972, in which the district court quashed the subpoenas, one subpoenaed party had already turned over one print of the film in New York to the FBI as a means of being excused from production of the print in Memphis. After the hearing on October 6, 1972, United States Magistrates in New Jersey, Minnesota, California and New York issued search warrants in their separate jurisdictions authorizing the seizure of prints and negatives of the film located there. As a part of the probable cause presented to those Magistrates, there was attached to the Affidavit For Search Warrant a certified copy of the Judgment On Obscenity entered September 15, 1972 by the district court. These search warrants were executed resulting in the seizure of nine (9) positive prints and two (2) negative prints. This makes a total of ten (10) positive and two (2) negative prints obtained by the United States and held as evidence in a pending criminal prosecution and Grand Jury investigation. Additionally, after entry of the Judgment On Obscenity, a seizure warrant was issued by the district court which was executed by the FBI, thereby, taking that positive print out of the bosom of the district court and lodging it with the United States for use as evidence.

On November 1, 1972 Petitioners here appeared in district court complaining that the seizures by search warrant violated the district court order orally rendered after the October 6, 1972 hearing on motion to quash subpoenas. They were instructed to amend their motion for preliminary injunction filed by Complaint on September 28, 1972 to reflect all events which had occurred subsequent to the filing. This Petitioners did on November 3, 1972. The district court set a hearing on the motion for preliminary injunction filed September 28, 1972, and amended November 3, 1972, for hearing at 2:00 p.m. on November 24, 1972.

On the day set for the hearing, November 24, 1972, but prior to 2:00 p.m., Petitioners amended the Complaint, which they had previously filed on September 28, 1972, by increasing the number of parties to include FBI officials, increasing the *ad damnum* sought and expanding the allegations on which liability is claimed to exist against Respondent and requesting the injunctive relief, including return of the seized prints, above discussed. On November 24, 1972 the district court conducted the scheduled hearing on the applications for injunctive relief filed prior to November 24, 1972, but for all intents and purposes, in that respect, the relief sought was always the same, i.e., return of the seized prints and an effectual holding that Petitioners could continue the distribution and exhibition of the film without fear of sanction or future seizure during the pendency of the criminal case. It is the denial of this relief which Petitioners seek reviewed.

On February 15, 1973, the Grand Jury returned its last indictment pertaining to offenses connected with "School Girl". See Petition, Appendix E, pp. 45-46 for a part of the indictment. The indictment names 25 individual and corporate defendants charged to be producers,

directors, distributors and sub-distributors throughout the United States, none of wh a reside or are located in the Western District of Tennessee. That indictment includes five substantive counts charging violations of Title 18, United State Code, §1462 and §2 and one conspiracy count charging a violation of Title 18, United States Code, §371. The indictment is 17 pages in length and alleges overt acts which occurred at various places throughout the United States including, and in addition to, Memphis. The indictment simply stated charges a conspiracy to distribute the film nationwide. Most of the defendants did not engage in any direct activity within the Western District of Tennessee.

Although the seized prints, at the present time, are primarily being held as evidence of the crimes alleged in that pending indictment, that hardly is the exclusive need for or evidentiary value of the prints. To say the least the prints presently held represent the initial evidence of numerous substantive violations of §1462, not to mention the local violations in jurisdictions which literally span the length and breadth of the United States. The pending indictment returned February 15, 1973 does not include any local exhibitors as co-conspirator-defendants. This is so only because their number is so great that it is not logistically possible to proceed with prosecutions of all such possible defendants in a single location. However, to require the return of the seized prints, in addition to requiring relinquishment of the evidence in the presently pending criminal case in Memphis, would effectively make impossible prosecutions of other violations in other jurisdictions by suppressing the critically vital evidence for such prosecutions.

ARGUMENT

I

Did the prayer for money damages from Respondent in Petitioners' Complaint invest the district court with any power or authority?

Petitioners initiated the action which resulted in the appeal, which is the subject of their Petition here, by filing a Complaint against Respondent as an individual and in his capacity as an Assistant United States Attorney. The United States is not a named party-defendant. The district court was alleged to possess jurisdiction, and did assume jurisdiction, under Title 28, United States Code, §1331. The injunctive relief sought clearly is demanding action on the part of the sovereign which neither Respondent nor any other named defendant could effect except in his representative capacity. That aspect of the lawsuit clearly is a suit against the sovereign, and the fact that it is denominated against specifically named persons is immaterial. *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 687 (1949); and *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963)

In addition the Complaint seeks money damages against Respondent for violation of the constitutional rights of Petitioners. However, neither in the Complaint nor the Amended Complaint did Petitioners allege any conduct on the part of Respondent, or any co-defendant, was engaged in which was not in performance of their duties as government officials nor outside the realm of discretion placed on them by their office. In fact, the only reasonable reading of the Complaint and Amended Complaint requires an interpretation that all actions alleged specifically were taken in an official capacity and were well within their discretion. In fact, Petitioners claim injury as a result of

execution of search warrants issued by independent judicial officers of the United States. In effect Petitioners allege that the exercise by Respondent of discretion in performance of the duties of his office caused monetary loss to Petitioners. There is a single reference that the Respondent exercised this discretion in "bad faith". However, there is nothing alleged to indicate that the "faith" of Respondent, bad, good or indifferent, was manifest by actions not authorized by the dictates of Respondent's office.

It is elementary that Title 28, United States Code, §1331 does not extend any waiver of sovereign immunity of the United States. To the extent that the suit here initiated seeks relief against the United States, it is barred from its inception by the doctrine of sovereign immunity. There is not now, nor has there ever been, any waiver by the United States whereby one can seek a civil remedy against the United States, the purpose of which is to gain return of property seized as evidence of a crime. On the other hand this is not to say that one is denied remedy against an unlawful seizure. But, the exclusive remedy is that created by *Federal Rules of Criminal Procedure*, Rule 41. Thus, the filing of the Complaint here could not have the effect of granting or creating in the district court a power which it did not have; and, the attempted assumption by the district court of power to act was futile.

As to the relief sought against Respondent, he too is immune from *suit* by the doctrine of official or quasi-judicial immunity unless his actions were either outside the perimeters of his authority or the duties of his office and not within the realm of discretion necessarily imposed on him by his office. Short of such actions, the district court is *powerless* to take any action under a Complaint filed for the purpose of obtaining relief against an officer.

If the necessary allegations against an officer are made by Complaint, it is allowable for a district court to assume sufficient temporary power over the purported controversy to determine if there might be some facts sufficient to support the allegations and, therefore, establish power in the district court to continue in the case. However, where retained counsel skillfully files a Complaint with no allegation of acts by an official outside the scope of his office and without his discretion, no power ever invests in the district court to take any action but dismiss the Complaint. Thus, here again the attempt of the district court in the instant matter to assume jurisdiction was futile and of no effect. *Barr* v. *Matteo*, 360 U.S. 564 (1959) and *Bivens* v. *Six Unknown Agents*, 403 U.S. 388 (1971)

In this case the district court, apparently realizing the tenuous basis for jurisdiction, cited *Fifth Avenue Peace Parade* v. *Hoover*, 327 F.Supp. 238, 240 (S.D.N.Y., 1971) as authority for its exercise of jurisdiction. In the first place, the instant case hardly presents the extenuating circumstances there present, i.e., "a topic of considerable controversy and discussion" and "that if it is not heard in federal district court, it probably will not be heard at all." However, what's more, a district court cannot *create* power. *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234 (1922).

In conclusion, where there was no basis at all upon which the district court below could take any action, it is an absolute absurdity to allow Petitioners to continue to obtain appellate review of the action taken as if there were some legitimacy to the proceeding. Nevertheless, this Brief will proceed to show that all actions taken by Respondent were supremely correct in law and fact, but this is not to be interpreted as abandonment of this, the primary contention of Respondent.

II

Does DiBella v. United States, 369 U.S. 121 (1962), prohibit an appeal from the decision of a district court denying return to persons who are defendants in a pending criminal case of items which are evidence in that criminal case?

In the case of *DiBella* v. *United States,* 369 U.S. 121 (1962), it was held to be beyond question that never, under any circumstances, could an interlocutory appeal be taken by defendants in a criminal proceeding from a ruling at the trial court level adverse to them until the proceeding became final at that level. It was further held that in determining whether or not an appeal was in a criminal case, the essence of the lawsuit would be judged by the relief sought, as opposed to, whether the lawsuit was superficially denominated as "civil" or criminal. The mere fact that jurisdiction at the trial court level is invoked under a civil remedy by an action collateral to the pending criminal case does not change the character of the lawsuit *in esse,* and, to qualify as separate, the "civil" action must have independence vel non. Where an action is designed to obtain the return of property to defendants held as evidence in a pending criminal proceeding, although the defendants have assumed the position of plaintiffs in the "civil" action, it does not possess requisite finality for appeal. The facts in the instant matter belie any assertion that the effort of Petitioners is any more than just that. The clear and unequivocal principle of law set out in *DiBella* v. *United States,* 369 U.S. 121 (1962) has been held applicable in the context of an attempted appeal by criminal defendants in an effort to obtain review of a district court decision where the defendants moved pre-indictment for return of books adjudged obscene in an adversary hearing. See *United States* v. *Peachtree National Distributors,*

456 F.2d 442 (5th Cir., 1972). In that decision the Court of Appeals stated in its opinion as follows in 456 F.2d at 444:

> "We are not unmindful of appellants first amendment claims; we simply do not reach them."

The Court of Appeals below recognized the import of the *DiBella* decision in its opinion where it stated as follows in 503 F.2d at p. 136: (See also Petition p. 24, Appendix C.)

> "These precise evils are what *DiBella* sought to prevent, and were it not for the competing policy urged by the plaintiffs-appellants, and examined below, this appeal would be dismissed forthwith."

The Court of Appeals went on in its decision to characterize the "competing policy" to be the rights guaranteed under the First Amendment concerning the right to free exercise of *speech*. Thereby, the Court of Appeals created a hitherto unknown exception to the rule of law articulated in *DiBella* v. *United States*, 369 U.S. 121 (1962). In creating this exception, it is respectfully submitted that the Court of Appeals completely misapplied and misconstrued the holding in *Heller* v. *New York*, 413 U.S. 483 (1973).

III

Is material adjudicated obscene by a district court, after a full adversary hearing on the issue, subject to any protection under the First Amendment?

In *Heller* v. *New York*, 413 U.S. 483 (1973) a fact situation was present where there had been a pre-adversary hearing seizure of a film. Post-seizure there had been an adversary hearing; however, the question presented was whether or not the seizure of the film prior to an adver-

sary hearing completely invalidated the seizure so as to cause suppression of the film as evidence in an ensuing criminal prosecution. It was held that since there was probable cause for the initial seizure and a post-seizure adversary hearing, the initial seizure was not illegal, and the film could be retained by the prosecution for use as evidence in its criminal case. In that context, it was held that between the time of the initial seizure and the adversary hearing, the *exhibitor* from whom the film had been seized must be given an opportunity to copy the seized film for continued distribution until there had been an adjudication based on an adversary hearing. Even this right to copy was contingent on the exhibitor demonstrating that he had no other copies of the film available for distribution during the time intervening between the seizure and the adversary hearing.

In the instant case there was no pre-adversary hearing seizure and the possessor of the film was not an exhibitor. The film itself was physically brought to district court by employees of a common carrier with whom the film had been lodged for transportation. Further, the Order To Show Cause which initiated the proceeding was served on the exhibitor who had just concluded showing the film, and there was an open court hearing commenced with invitation to anyone who had an interest in the film to participate in an adversary capacity. Before the commencement of the adversary hearir g Michael F. Pleasants, Esq., who is now here representing Petitioners, appeared in district court demanding return of the film but refusing to name anyone whose interest he represented. The district court allowed anyone willing to be subject to the in personam jurisdiction of that court in their handling of the film pending the conclusion of the adversary hearing to request it to return the film to them. No one would accept

such responsibility and the district court was left with no other alternative than to hold the film in its possession as the *res* of the controversy. However, at the request of Mr. Pleasants the already commenced adversary hearing was recessed in order to allow further participation on the part of anyone claiming an interest in the film. A further difference in facts here and there, as conceded by Petitioners on p. 9 of their Petition, and as demonstrated by their conduct subsequent to the commencement of the adversary hearing, they retained several copies of the film for use in exhibition and, in fact, continued exhibition and distribution of "School Girl."

As clearly recognized by the decision in *Heller* v. *New York*, 413 U.S. 483 (1973), after an adjudication, the result of a full adversary hearing, that a film is obscene, there exist no further rights under the First Amendment which relate to such a film. That decision hardly could be construed to contemplate that an exhibitor could continue, after such an adjudication, to distribute the subject film shrouded by any protection afforded by the First Amendment. A thing which is obscene is not speech. Until such an adjudication of obscenity is overturned in a proper proceeding before a competent tribunal, the film remains obscene. In effect this amounts to a holding that the film is included within the category of material regulated by Congress' exercise of its commerce power as manifested by federal obscenity statutes. In the instant case it is hard to imagine how a more complete and thorough adversary hearing could have been conducted. Further, no subpoenas issued nor were any search warrants executed prior to the entry of the Judgment On Obscenity entered September 15, 1972.

However, the Court of Appeals somehow envisioned the *Heller* decision as mandating that Petitioners had some

right vested by the First Amendment to continue distribution and exhibition of materials adjudicated obscene or, to put it another way, to be material regulated by federal obscenity statutes. Based on this misconceived right of Petitioners, the Court of Appeals entertained the appeal of the Petitioners in spite of the clear dictates of *DiBella* v. *United States*, 369 U.S. 121 (1962) to the contrary and required the district court to order that Petitioners be allowed to copy the seized film for continued distribution. When this right, envisioned by the Court of Appeals to exist under the First Amendment, expires is not specified. However, because the First Amendment and obscenity are mutually exclusive and inconsistent, it is abundantly clear that no one has any right bestowed by the First Amendment to do anything with obscene material.

Although it is clear from footnote 8 in *Heller* v. *New York*, 413 U.S. 483, 492 (1973) that multiple copies of a single fim may not be held where such amounts to "purely cumulative evidence," that certainly is not the case here. Indeed, there hardly could be more convincing evidence of a nationwide conspiracy to distribute the film in question than that the owners of the film have copies of the same film placed at various locations throughout the United States with exhibitors, processors, shippers and warehouses. Further, the very containers in which the films were found bear extremely incriminating evidence as to the use and shipment of this particular film from place to place throughout the United States. These are only two of many observations which could be made concerning the extreme importance of these particular prints as evidence of the crime alleged in the pending indictment.

It also is interesting to note that in the recent case of *G. I. Distributors, Inc.* v. *Murphy*, 469 F.2d 752 (2nd Cir., 1972) and 490 F.2d 1167 (2nd Cir., 1973), 19,000 copies of

55 separate titles of books and magazines were seized on the premises of a wholesale distributor. In that case a search warrant was issued in an ex parte proceeding authorizing the seizure of six copies each of 55 separate titles. While at the warehouse the officers observed an additional 19,000 copies of the publications, placed them in cartons and posted a guard overnight at the warehouse. An adversary hearing was conducted the next morning, the materials in question were determined to be obscene and a search warrant issued for the remaining 19,000 copies. The Court of Appeals there reversed the district court's holding that the posting of guards at the warehouse constituted a prior restraint which invalidated the entire seizure. By its opinion in that case the Court of Appeals implicitly holds that there is no right to distribute material after it has been adjudged obscene. Petition for certiorari was granted by this Honorable Court, but in *G. I. Distributors, Inc.* v. *Murphy*, 413 U.S. 913 (1973) the decision of the Court of Appeals was vacated and remanded for further consideration. Thereafter, the Court of Appeals reconsidered its prior decision specifically in light of *Heller*, supra, and authored a second opinion holding that *Heller* did not proscribe the seizure and stating that federal injunctive relief under Title 42, United States Code, §1983 is available to require *return* of illegally seized materials alleged to be obscene. See *G. I. Distributors* v. *Murphy*, 490 F.2d 1167 (2nd Cir., 1973). Throughout the subsequent opinion it is abundantly clear that it is a foregone conclusion not even worthy of specific note that after an adversary hearing adjudication of obscenity there exist no rights, First Amendment or otherwise, on the part of the owners of the seized books to possess them. This Honorable Court upon consideration of a petition for certiorari from the second opinion denied the petition on April 15, 1974 in *G. I. Distributors, Inc.* v. *Murphy*, 416 U.S. 939 (1974). Therefore,

it is apparent that there is no right whatever relating to materials judged obscene in an adversary hearing during the pendency of a criminal proceeding connected thereto and obviously quantity is not the sole test as to whether multiple copies are "purely cumulative evidence."

Thus, it must be recognized that the Court of Appeals below already has granted Petitioners more than the law allows and for them to now seek further relief here is a spurious request.

IV

Does the Constitution prohibit or restrict prosecutions for violation of Title 18, United States Code, §371 for conspiring to distribute obscene materials in interstate commerce "throughout the United States" in violation of Title 18, United States Code, §1462?

The Petitioners contend that, in effect, there is no such thing as a prosecutable conspiracy under Title 18, United States Code, §371 to distribute obscene material in interstate commerce "throughout the United States". Based on this premise the Petitioners' argument logically proceeds to the conclusion that the prints seized in the instant case outside Memphis could not be seized and held as evidence of a crime, which they contend, the Constitution does not recognize. In one sense this is a challenge to the second prong of probable cause required for the issuance of a valid search warrant; that is, there must be probable cause that the thing sought to be seized is evidence of a particular *crime*. Petitioners claim that acceptance of their contention leads to the conclusion that the seizures of the prints were illegal and, thus, they are entitled to the injunctive relief which they seek, to wit, return of the seized films.

It has never been, and is not now, conceded that the films seized outside of Memphis are not evidence of the substantive violations which are alleged to have occurred in Memphis, but Respondent's argument will proceed on the basis that this is immaterial since prosecution for a national conspiracy is constitutionally permissible. That such a prosecution in permissible, and *a fortiori* the seizures here being questioned were legal, is necessarily implicit in the holding below by the Court of Appeals.

In order to gain a proper perspective, in the context of the crime charged in the indictment pending, concerning the conspiracy to distribute "School Girl" in interstate commerce a few short observations are in order. The crime alleged in Count One of that indictment is a simple conspiracy. It was a totally completed crime as soon as two or more of the co-conspirators agreed, with knowledge of the general character of the content of "School Girl", to produce the film and distribute it throughout the United States, which, of course, necessarily implies in interstate commerce. Thereafter, as soon as one cameraman was hired (or some similar overt act) was engaged in in execution of the objectives of that agreement, the crime was complete and prosecutable in any jurisdiction where the agreement was consummated or an overt act performed. Though the prosecutive merit would have been nil, theoretically, even if the film never had been finally produced, the crime alleged would have been completed. Insofar as the allegations contained in the indictment are concerned, they merely evidence additional overt acts and the inclusion of additional co-conspirators who joined in the already commenced and continuing crime. The actual distribution of the film is not charged in Count One of the indictment as a crime and any interstate transportation of the film falls in the category of nothing more than an additional overt act evidencing the details and

intent of the agreement. The only relation of Memphis to the crime charged is the allegation that one or more of the overt acts occurred in Memphis. This fact, and this alone, establishes venue in the Western District of Tennessee. For the purpose of analysis, the fact that some of the overt acts which occurred in Memphis include the interstate shipment of the film to Memphis and its exhibition in Memphis is coincidental and superfluous to the fixing of venue there. As to the allegations in the indictment, the relationship of the vast majority of defendants to conduct which occurred in Memphis is indirect.

Though the point never has been spoken to directly, whether or not the Constitution requires the application of a different rule of law concerning venue in a prosecution for a conspiracy to violate federal obscenity statutes than those applied in a conspiracy to violate any other federal statutes, in the decision in *Hamling* v. *United States*, ... U.S. ....., 41 L.Ed.2d 590 (1974), it was noted that that case involved prosecution for conspiring to violate Title 18, United States Code, §1461. See *Hamling*, supra, 41 L.Ed.2d at 605-606. Further, when appraising the evidence of record in that case, the commonly accepted rule of establishing an agreement by circumstances in order to prove conspiracy was specifically cited. See *Hamling*, supra, 41 L.Ed.2d at 625.

Further, references to recent cases decided by this Honorable Court show an inclination not to distinguish offenses related to obscenity from any other type of criminal conduct. Rather, there appears to be a well advised deliberate effort to demonstrate that all of the normally accepted rules of law applicable to crime generally are equally applicable to obscenity violations.

In *Miller* v. *California*, 413 U.S. 15 (1973) the court observed as follows at p. 26:

> "In resolving the inevitably sensitive questions of the facts involved, we must continue to rely on the jury system, accompanied by the safeguards that judges, *rules of evidence, presumptions of innocence and other protective features provide, as we do with rape, murder and a host of other offenses against society and its individual members.*" (Footnote omitted) (Emphasis added)

Of further significance in this connection are observations made in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973) where it was observed as follows at pp. 61-62:

> "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underline much lawful state regulation of commercial and business affairs. (Citations omitted) The same is true of the federal securities, antitrust laws and *a host of federal regulations.* (Citations omitted) On the basis of these assumptions both Congress and the state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing 'coupons' and 'trading stamps', commanding what they must and may not publish and announce." (Citations omitted) (Emphasis added)

Continuing in the same case at p. 62:

> "Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources, our forests, streams and parks, they must act on such imponderables . . . ."

Continuing in the same case at p. 64:

> "We have just noted, for example, that neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares."

Continuing in the same case at pp. 67-68:

> "The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of *drug sales* is not prohibited by the Constitution." (Citation omitted) (Emphasis added)

Continuing in the same case further at fn. 15, p. 68:

> "The State statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fists' prize fights, and duels, although these crimes may only directly involve 'consenting adults.' Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision. (Citations omitted) Consider also the language of the Court in (citation omitted) as to adultery; (citation omitted) as to fornication; (citations omitted) as to 'white slavery' (citations omitted), as to billiard halls; (citation omitted), as to gambling."

The analogy of obscenity and controlled drugs was again recognized in *United States* v. *12-200 Foot Reels*, 413 U.S. 123 (1973) where it is stated at p. 128:

> "To allow such a claim would be not unlike compelling the Government to permit importation of *prohibited or controlled drugs* for private consumption as long as such drugs are not for public distribution or sale." (Emphasis added)

This Honorable Court seemed to summarize its attitude concerning whether or not there is any permissible distinguishing characteristic between obscenity and any other criminally regulated conduct by the following observation in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973) where it says at p. 62:

> "Understandably those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography."

In the context of discussion concerning federal statutes prohibiting commerce in obscenity this Honorable Court repeatedly recognized, under Article I, §8, Cl. 3 of the Constitution, Congress has the exclusive and plenary jurisdiction to determine what items may be prohibited from movement in the stream of interstate or foreign commerce. In *United States* v. *Orito*, 413 U.S. 139 (1973), it was observed as follows at p. 143:

> "Given (a) that obscene material is not protected under the First Amendment (citations omitted), (b) that the Government has a legitimate interest in protecting the public commercial environment by preventing such material *from entering* the stream of commerce (citation omitted) . . . we cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because material is intended for the private use of the transporter . . . . Congress may regulate on the basis of the natural tendency of material . . . . Congress could reasonably determine such regu-

lation to be necessary to effect permissible control of interstate commerce in obscene material, based as that regulation is on legislatively determined risk of ultimate exposure . . . ." (Emphasis added)

In the same case further discussion appears at p. 144:

"'The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.' (Citations omitted) 'It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature.'" (Citation omitted)

In *Orito* the matter was discussed further at p. 144, fn. 6:

"'Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote the immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce . . . .'"

In *United States* v. *12-200 Foot Reels*, 413 U.S. 123 (1973), discussing the power of Congress over the regulation of the transportation of obscenity in foreign commerce, it is noted at pp. 125-126:

"The Constitution gives Congress broad, comprehensive powers '[t]o regulate Commerce with foreign Nations.' Article 1, §8 . . . The plenary power of Con-

> gress to regulate imports is illustrated in a holding of this Court which sustained the validity of an Act of Congress prohibiting the importation of 'any film or any other pictorial representation of any prize fight . . . designed to be used or [that] may be used for purposes of exhibition' in view of 'the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles . . . .'" (Citations omitted)

In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), quoting from *Griswold* v. *Connecticut*, 381 U.S. 478, 482 (1965), the limited prerogative of the judicial branch in such matters was noted as follows at p. 64:

> "'We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.'"

This Honorable Court three times specifically analogized Congress' exercise of its commerce power over movement of obscene materials to the same exercise of power over movement of white slaves and gambling paraphernalia. See *United States* v. *12-200 Foot Reels*, 413 U.S. 123, 128, fn. 6 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 68, fn. 15 (1973); and *United States* v. *Orito*, 413 U.S. 139, 144, fn. 6 (1973). This is a very significant analogy. Neither prostitution nor gambling is prohibited in all states and in every state there are some differences in the laws regulating the activity reflecting more or less tolerance from state to state. The likenesses or dissimilarity of states' regulation of this conduct is coincidental. However, if two contiguous states declared by legislation that there is not, nor ever has been, any such thing as prohibited gambling or prostitution in either of the con-

[illegible] states, this would make it no less a violation of federal regulatory statutes to transport a prostitute or dice table between those two states. Furthermore, if a third person had placed a phone call from a third state, which initiated the transportation, the fact that both prostitution and gambling offenses in that state were capital offenses would not deprive the federal court in the third state of venue to try the federal conspiracy violation. The only question there to be resolved is whether the material or person transported was a prostitute or gambling device under federal law apart from the law of any of the [illegible] including the forum, states. That the jurors in the forum court might possibly be influenced by the mores of the place of their upbringing in making that determination is unavoidable and not unconstitutional. Finally, no one seriously suggests that this exercise of power by Congress of transportation of women for immoral purposes or gambling devices fixes the moral standards concerning these matters throughout the United States as that of the most restrictive moral standards prevailing in a particular state.

In *United States* v. *12-200 Foot Reels*, 413 U.S. 123, 130, n. 7 (1973), this Honorable Court describes that which is the subject of federal obscenity statutes as "regulated material" and says that it is prohibited from *entering* commerce. Further, in *Miller* v. *California*, 413 U.S. 15, 24-25 (1973) there is a detailed description of obscenity and throughout that discussion the word "regulation" was used in reference to the material being described. Thus, the ultimate question in determining whether or not there has been a violation of federal obscenity statutes is whether particular material in question falls within the category of that regulated.

It is the contention of Petitioners that a geographically defined local community standard mandatorily is an *element* of each violation of a federal obscenity statute. Based on this contention, Petitioners claim that any violation of a federal obscenity statute is prosecutable only in the district where a particular defendant directly has been involved with that material in that district. This is claimed necessary because only in that district can a jury be assembled which can determine what the particular community standard is within the specified political boundaries.

The position of Petitioners is ill-founded on several bases. In the first place geography is of little, if any, significance ever in determining what community standards are applied by a jury to determine if material is obscene. Never has it been *required* that any forum anywhere located apply standards identifiable only with and in a particularly designated geographical community. If there were ever any doubt on this point, it certainly was removed by *Hamling* v. *United States*, ... U.S. ....., 41 L.Ed.2d 590 (1974). The *Hamling* decision specifically states in 41 L.Ed.2d at 613:

> "Miller rejected the view that the First . . . Amendments *require* that the proscription of obscenity be based on uniform nationwide standards of what is obscene . . . . But in so doing the Court *did not require* as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of 'the average person, applying contemporary community standards.' " 413 U.S. at 24. (Emphasis added)

Hamling goes on in 41 L.Ed.2d at 613:

> "Our holding in Miller that California *could* constitutionally proscribe obscenity in terms of a 'statewide' standard *did not mean* that any such precise geographic area is *required*, as a matter of constitutional law." (Emphasis added)

The subject was more clearly addressed in *Jenkins* v. *Georgia*, ... U.S. ....., 41 L.Ed.2d 642 (1974) where it is stated at 648:

> "We agree with the Supreme Court of Georgia's implicit ruling that the Constitution *does not require* that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. Miller *approved* the use of such instructions; *it did not mandate* their use . . . . We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' *without specifying what 'community'*. Miller held that it was constitutionally *permissible to permit* juries to rely on the understanding of the community from which they came as to contemporary community standards, ... A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in Miller *without further specification*, as was done here, or it *may* choose to define the standards in more precise geographic terms, as was done by California in Miller." (Emphasis added)

Therefore, it becomes imperative to sound analysis to make a clear distinction between what is required and what is permitted when seeking to determine the constitutional requirement as related to community standards. The simplest logical precepts dictate that merely because

a thing is permitted does not make it required. Never is it *required* that the word "community" be considered in geographical terms. When one seeks to impose a requirement that geographically defined local community standards be mandatorily applied in a federal obscenity prosecution, in addition to logically absurd conclusions, constitutional barriers arise.

From a logical standpoint, the only conclusion one could reach is that Congress in exercise of its plenary and exclusive power over commerce would have legislated against the movement of a nonentity. In other words, Congress has specifically said that obscene material may not *enter* the channels of commerce. However, if that which is prohibited from *entering* that stream would not be definable until after entry, this is an absurdity. If that were the case, it would be impossible for one to know whether he had violated the law until after the violation occurred. In effect, that would be telling the constituency bound by the legislation to do whatever you want and we will later determine if what you did was a violation of the law. That is the very essence of the constitutional prohibition against bills of attainder and ex post facto application of criminal law.

However, there is still another logical inconsistency in requiring application of a geographically defined local community standard in a federal prosecution. In *United States* v. *12-200 Foot Reels*, 413 U.S. 123 (1973) it specifically was held that Title 19, United States Code, §1305(a), prohibiting the importation of obscene material into "the United States", was constitutional. Further, it is now beyond question that a national community standard is "unprovable", "hypothetical" and "unascertainable". But if the geographically definable local community standards are required to be applied in order to identify that

which is obscene, this prohibition by Congress in exercise of the commerce power to prohibit the entry into the "United States" of obscene material is totally meaningless. Such a judicially imposed restriction on the exclusive and plenary power of Congress over commerce would amount to a repeal of that statute and the substitution of one which would merely prohibit bringing into a particular port of entry materials which exceeded that local community's standards.

That which Congress has prohibited from *entering* the stream of commerce essentially must be something which is identifiable and definable before its movement. Such material remains in the regulated category before its movement, during its movement and throughout its very existence. To conclude otherwise renders nugatory the clearly constitutional exercise of the commerce power of Congress.

Another necessary effect of concluding that geographically definable local community standards control the very definition of "obscenity" under federal obscenity statutes is that bodies politic not empowered to do so are vested with power to declare a constitutionally exercised power placed by the Constitution solely and exclusively with Congress of no effect.

For the purpose of illustrating this point, it is immaterial what is the proper means of expression by a local community as to what, if any, standards it has concerning obscenity. It is further immaterial what the geographic dimensions of the community are determined to be. By federal statutes prohibiting interstate and foreign commerce in obscene material Congress has prohibited the movement of such from one state to another. However, under the geographical definable local community standards argument, if two contiguous states simultaneously

declared by some appropriate means that there were no standards appertaining to obscenity, then material declared by Congress to be regulated and impermissible to move in commerce could freely flow between those two states and a congressional enactment thereby would be nonoperative and effectively repealed in an area of the United States. Further, if that is a possibility as to two states it is possible as to all fifty states and there then would be a valid congressional enactment which would have become totally unenforceable. There could be no clearer violation of the Commerce Clause imagined.

The judicial branch may declare legislation inoperative *only* if it is unconstitutional. No other body, organized or not, within the framework of our society has any power whatever to negate or ignore at will an enactment of Congress. Here the statutes in question specifically have been declared by this, the highest court in the land, to be constitutional. Thus, no group of people anywhere have the power either to expand or render effectively invalid the pertinent statutes. The First Amendment cannot be so construed that it tends to encroach on the powers of Congress under the Commerce Clause. As noted above, First Amendment absolutism is an unacceptable form of reasoning when considering the relationship of speech to obscenity to constitutional dictates. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62 (1973) Each and every constitutional provision must be given equal validity and force with every other and a course charted which is compatible with all.

This Honorable Court clearly has recognized that the thing that is prohibited from channels of commerce by the federal obscenity statutes was a thing in existence, definable and identifiable before it ever moved. *United States v. Orito*, 413 U.S. 139 (1973), stated at p. 143:

> "The Court has consistently rejected constitutional protection for obscene material outside the home. (Citions omitted)....
>
> [t]he Government has a legitimate interest in protecting the public commercial environment by preventing such materials from *entering* the stream of commerce. . . . ." (Emphasis added)

Obviously that statement contemplates something in existence which is prohibited from crossing a state line prior to any movement whatever and that it is identifiable as obscenity before such movement. Both *United States* v. *Orito*, 413 U.S. 138 (1973) and *United States* v. *12-200 Foot Reels*, 413 U.S. 123 (1973) discussed and rejected the *reasoning* process based on what was known as the "correlative right" theory as it related to one's right to possess obscene material in the confines of his own home. That right itself necessarily is based on two assumptions. The first is that the thing possessed is in fact and law obscene; and, the second is that one has a constitutional right to possess that obscene thing in his home. In the context of discussing this correlative right theory it is noted in *United States* v. *12-200 Foot Reels*, 413 U.S. 123 (1973) as follows at p. 128:

> "Nor is there any correlative right to transport obscene material in interstate commerce."

That very statement necessarily is based on the same two assumptions above referred to when considering the correlative right theory in relation to one's home. The plain import of that statement is that the same logical reasoning process which refutes the correlative right theory as it relates to possession of obscenity in one's home, also, refutes any purported reasoning process which would have the possibility of allowing one to transport obscene material

outside a given state irrespective of whether that material is obscene when applying local community standards within the state where it is possessed or the local community standards within the community outside that state in or to which it is transported. Such a theory would amount to a re-emergence of the rejected correlative rights theory on the basis that the material one possessed in his own home was acceptable there, and it also was acceptable in his neighbor's home, therefore, he possessed the right to transport it from his home to that of his neighbor. This clearly is not the law and has been clearly recognized as not being the law by this Honorable Court.

Petitioners here, in support of their ill-founded contention, seek to find refuge in this Honorable Court's prior pronouncements recognizing the obvious fact that standards concerning tolerance in depiction of sexual conduct are not necessarily the same in Maine and Mississippi. See Petition p. 16. What Petitioners lose sight of is that this observation comes in the context of considering states separately as individual entities and units of government with the population of each having control over its own destiny to a certain degree apart from the whims of other like-situated entities. That is to say, that the people of the State of Maine should be free, within that State, to decide that nothing is obscene or that much is obscene and that the people of Mississippi should be given the same prerogative irrespective of what conclusion the State of Maine might reach on the same subject. However, nothing in these observations implies that the people of the State of Maine have a right to export their standards outside of that State or be allowed to import into that State from other states materials fitted to the standards arrived at within that State. Nor does anything in these observations imply that if the people of the State of New Hampshire have reached the same conclusion as to the

standards as the State of Maine, then the people in those two states have a right to exchange between the borders materials which are regulated by valid congressional enactment in exercise of the control of Congress over commerce. Such movements of "regulated materials" between Maine and New Hampshire creates a pollution of the stream of commerce of equal concern to every other citizen of the United States be he situated in Maine or New Mexico.

Those contending for the position of Petitioners often refer to this Honorable Court's prior observations concerning the fact that different juries situated in different places might reach contradictory verdicts when adjudging the obscenity of the same material. See *Miller* v. *California*, 413 U.S. 15, 26, fn. 9 (1973). Again, quite often such persons miss the mark as to the import of these observations. The importance of the observations is that no one can ever be assured that a jury different from the precise twelve people assembled at any given time will reach this same conclusion on any given set of facts. The point perhaps is more cogently made by an illustration not related to obscenity. A person could be tried on a charge of first degree murder in Connecticut and found guilty by a jury there assembled. All of the parties and all of the same participants could take a transcript of that exact proceeding and re-enact the entire trial before another jury assembled in Texas applying the same law and the jury there might acquit. Or even more poignantly made, another twelve jurors may hear an identical case in the identical courtroom in Connecticut and acquit. However, this fact of life does not impeach the viability of the jury system nor the law applied. This is merely a fact of life inherent in our system of government and the geography of the situation is not controlling, but to the extent that the geography of the situation has any

effect, it too is a mere fact of life which does not portend unconstitutionality.

Finally, it is often urged that to allow venue to be established in a national conspiracy to distribute obscene material "throughout the United States" in the same manner that venue is established with any other type of violation would place in the hands of prosecutors the right to institute the prosecution in a district where it is determined that the tolerance in depiction of sexual material was most restricted, thereby making that standard the one controlling the entire nation. Even if that were a true observation, it fails to recognize that the government could likewise select a place to institute the prosecution which has the most lenient restrictions, thereby making those standards applicable to the remainder of the nation. Thus, such an observation cuts both ways as to persons at either end of the spectrum. It is no more applicable when discussing obscenity than when discussing white slavery or gambling. Since as a matter of fact it is a fanciful assertion in the first place, it is superfluous in its entirety.

In a federal prosecution under the obscenity statutes, the only question to be determined is whether specifically identified material falls in the category of that which Congress has regulated by the pertinent statute. That conclusion has absolutely no effect on what is tolerable within the borders of any particular state. The only consequence of a decision in a federal obscenity prosecution is that the particularly specified material may not be transported from one state to another or imported or exported within or without the United States. In fact, it is very possible that in a district which, by some appropriate means, has removed all restrictions as to the depiction of sexual matter, a jury might determine that the particular

material before it fell within the category of that regulated by the congressional enactment. By the same token, it is possible that in a district where there is much restriction on the depiction of sexual matter, material wholly unacceptable in that local community could be adjudged not within the category of material regulated by the pertinent congressional enactment. What may or may not be shipped in interstate commerce is not related at all to what may or may not be allowed to flow in commerce intrastate. This is the clear import of the comment in *Hamling*, supra, 41 L.Ed.2d at 614:

> "But this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside this particular district, if it felt such evidence would assist the jury in the resolution of the issues which they were to decide."

Of course, the ultimate issue to be decided by the jury in a federal prosecution is whether the material before them falls within a category of that regulated by the pertinent congressional enactment. In order to determine that fact the jurors are not bound to consider *only* the community standards prevailing within the boundaries of the district, state, city limits or precinct in which they sit or from which they were called. By the same token, they are not restricted from referencing those particular standards if relevant to the inquiry. To the degree that any particular juror might be affected by the standards with which he is most familiar by virtue of his residence in reaching this ultimate conclusion on the fact issue, this again is a mere fact of life inherent in our system of government which does not subvert the administration of substantial justice, comports fully with constitutional requirements and exists irrespective of the verbiage which might be used in an instruction to him. Further, in our

highly mobile society today, it is hardly uncommon for jurors to be selected, in any district in the United States, whose upbringing has been outside, and many times far removed from, the district in which he is called to serve. Under such a circumstance that juror's personal life might have been more influenced by a community other than the one in which he serves. There again this constitutes no constitutional problem. The object is to allow each juror a framework within which he can function without subverting the best possibilities for substantial justice by instructions which tend to confuse and stymie, such as seeking to impose on him the impossible burden of divining a nonexistent "national standard". Finally, it is presumptuous to conclude that every juror is so narrow-minded that it is impossible for him to consider factors outside his personal experience.

Of course, the First Amendment restricts all legislative bodies, be it Congress or the city council, equally in the matter of regulation of communication. However, the First Amendment as it relates to community standards has no mandatory geographical significance. The only relation of the First Amendment to geography under the community standards test is that it is permissive so as to allow local governments to define the community standards in geographical terms if, and only if, the responsible legislative body chooses to so define the community standards. In addition to what has already been pointed out in this connection, *Hamling* v. *United States*, ... U.S. ....., 41 L.Ed.2d 590 (1974) speaks to this point as follows at p. 628:

> "'As the Court made clear in Mishkin v. New York, 383 U.S. at 508-509, *the primary concern* with requiring a jury to apply the standard of "the average person, applying contemporary standards" is to be certain that . . . it will be judged by its impact on an average

> person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.'" 413 U.S. at 33 (Emphasis added)

The point was further addressed in *Hamling*, supra, 41 L.Ed.2d at 614-615:

> "This Court has emphasized on more than one occasion that a *principal concern* requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." (Citations omitted) (Emphasis added)

Again in *Hamling*, supra, 41 L.Ed.2d, at 613:

> "The juror is *entitled* (it should be noted this is not *required*) to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, *just as* he is *entitled* to draw on his knowledge of the propensities of a 'reasonable' person in *other areas of the law*." (Citations omitted) (Emphasis added)

Here again it is emphasized that the most appropriate analogy to the function of a juror in a federal obscenity case in determining the "community" standard is to the same non-empirical type determination that a juror is required to make when determining whether conduct of a litigant was commensurate with that of a reasonable person. Such a determination would not have geographical significance in the sense that political boundary lines would in any way enter in his conclusion. To the extent that geographical considerations play a part in a jury's determination of the standard of care in a tort suit in a federal

court, such considerations may play a part in a jury's determination of the standard of the average person applying contemporary standards in a federal obscenity prosecution. Geography is no more or less significant nor mandatory or permissive in one than the other.

The constitutional significance of the community standards requirement is summarized in *Hamling*, supra, 41 L.Ed.2d at 613-614:

> "The result of the Miller cases, therefore, *as a matter of constitutional law* and federal statutory construction, is to *permit* a juror sitting in obscenity cases *to draw on* knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." (Emphasis added)

This Honorable Court went on to say in *Hamling*, supra, 41 L.Ed.2d at 615 that the only time reversal would be required in this connection is when the charge to the jury failed to advise that they could not apply either their personal opinions or those of the most sensitive or most insensitive persons applying contemporary community standards. As noted above, in *Jenkins* v. *Georgia*, __ U.S. __, 41 L.Ed.2d 642, 648 (1974) it is perfectly permissible to instruct a jury to apply contemporary community standards without any further specification concerning the geographical significance of the word "community". This creates no impediment whatever and is suggested by Respondent to be most desirable in a federal prosecution.

Seen in this light there is no need for any special provisions of law concerning venue for conspiracies to violate federal obscenity laws any more than the need for

such special provisions for antitrust, securities or "a host of other federal regulations." In each case "regulated material" and conduct is the subject of prosecution and the primary inquiry, wherever the prosecution may be, is whether there has been commerce in the "regulated material." Except that in one case the "regulated material" is obscenity and the other the regulated material is stolen motor vehicles, which is an irrelevant difference, the observation made in the context of a nationwide conspiracy involving interstate transportation of regulated material, i.e., stolen motor vehicles, made in *United States* v. *Nasse*, 432 F.2d 1293 (7th Cir., 1970) is equally controlling in a nationwide conspiracy to transport obscenity interstate. The observation is found in 432 F.2d at 1297:

> "Here, unlike Kotteakos, the defendants knew that illegal acts on the part of the chain of participants-counterfeiters, camouflagers, people who transport the stolen autos and salesmen—were necessary to the total operation."

Therefore, there exists no reason, in fact or law, why a prosecution for conspiring to violate federal obscenity laws should be treated in any way any differently than violation of any other federal law. That is to say that there is nothing about obscenity that makes it any less susceptible of distribution nationwide than any other regulated material. If such regulated material is in fact distributed throughout the nation, it would be virtually impossible for it to be done without a plan and agreement to do so by at least two persons with overt acts at least as widespread as the distribution. One who engaged in such a far-reaching plan and agreement accompanied by conduct, he, not the government or the law as such, but he alone exposes himself to multiple places where venue might lie. Needless to say that some of the places for

venue will be more convenient and tactically more advantageous than others; but, this is true irrespective of the nature of the crime. Further, the defendants create the situation, not the prosecutor. Too, it is not the purpose of the law to meet the convenience of or provide tactical advantages to those who offend its provisions. The only rights of a criminal defendant which the judiciary can recognize are statutory and constitutional.

There certainly is no statutory right which would prohibit prosecution of a nationwide conspiracy to distribute obscene material "throughout the United States" and the suggested constitutional right based on a geographically local community standard argument which would localize venue is spurious and absurd. As this Honorable Court has given indication, there is absolutely no mandatory geographical significance to the word "community" in this context. Under the present state of the law the word "community", when used in the phrase "contemporary community standards" in relation to the definition of obscenity, is a superfluous relic which is confusing to the public at large, the judiciary and the bar. Further, this word, because its most common usage connotes a geographical dimension, provides rich fodder for those whose designed objective it is to inject confusion and foster turmoil in this area of law to their own gain. Thus, though better practice would be to completely discard use of the word "community" in this connection, Petitioners are completely out of place in seeking reversal of the decision of the Court of Appeals below which, at least, gave obeisance to the correct non-geographical meaning of "community", even though that was done only by implication.

In conclusion the Court of Appeals for the Sixth Circuit was imminently correct in its holding that the seizures of the copies and negatives of "School Girl" in various parts of the United States was appropriate and that the

crime charged in the indictment, i.e., conspiracy, for which these copies and negatives are evidence, is controlled by *Hamling* v. *United States,* ..... U.S. 41 L.Ed.2d 590 (1974)

CONCLUSION

Respondent mistakenly was under the impression that this Honorable Court had granted an extension of time up to and including February 21, 1975 within which Respondent could file a Cross-Petition For Certiorari. Instead, the extension of time granted was only for the purpose of allowing a Conditional Petition For Certiorari. Thus, although Respondent personally feels that, because of the important questions raised, justice throughout the Nation would best be served by a resolution of these issues by this Honorable Court, he is now precluded from so petitioning.

As is so often the case bad precedent develops in the law when, as here, there is action taken at the trial court level which is based on an erroneous concept. Here, all of the difficulties which have since arisen would have been avoided had the district court, in accordance with the law, recognized that it was powerless to act and dismissed the Complaint. However, the district court failed to do that and the appellate process needlessly was cluttered with frivolous issues. The error of the district court was then compounded by the Court of Appeals' failure to recognize the error of the district court and remanding the case with instructions to the district court to correct its error by dismissing the Complaint. Instead, the Court of Appeals considered the case and rendered a reported decision, as if there were some legitimacy to the initial proceeding, and created binding precedent which results in a split in the law in the circuits on two vital issues which portends grave consequences which very likely will un-

necessarily increase attempts to gain review by this Honorable Court of countless cases. The end result is that, in addition to injecting unfortunate confusion in substantive law, it counteracts the ends of justice inherent in the most efficient functioning of the appellate process. How to best thwart these unfortunate results is the dilemma now facing this Honorable Court.

By its decision below the Court of Appeals created an exception to the doctrine of *DiBella* v. *United States*, 369 U.S. 121 (1962) prohibiting interlocutory appeals in a criminal case stating, in effect, that if a defendant can fashion an argument that an adverse ruling at the district court level in some way tends to interfere with his or someone else's First Amendment rights, then an interlocutory appeal is permissible. This is in direct contradiction to the ruling in *United States* v. *Peachtree National Distributors*, 456 F.2d 442 (5th Cir., 1972). The ruling of the Court of Appeals below sets up a "right" to an interlocutory appeal in virtually every federal obscenity prosecution not to mention any other criminal case where an inventive defendant could make such an argument. This potential difficulty could be solved by vacating the decision of the Court of Appeals below with instructions to reconsider the application of the precepts of *DiBella* v. *United States*, 369 U.S. 121 (1962) as applied in *United States* v. *Peachtree National Distributors*, 456 F.2d 442 (5th Cir. 1972).

The decision of the Court of Appeals below also, creates a right which entitled defendants in a criminal obscenity prosecution, after a full adversary hearing adjudication of obscenity of subject materials, to be supplied with the means, i.e., copies, to continue distribution or exhibition of that material for some unspecified period of time. This clearly is a result not contemplated or sanctioned by *Heller* v. *New York*, 413 U.S. 483 (1973). Further, it is

in virtual contradiction to the holding in *G. I. Distributors, Inc.* v. *Murphy*, 490 U.S. 1167 (2nd Cir., 1973), cert. den. 416 U.S. 939 (1974) interpreting the specific provisions of *Heller*. To allow the decision below to remain unabated as reported precedent on this point creates an opportunity for courts throughout the Nation to separately rely on either of the two divergent interpretations of *Heller*, thereby, causing total confusion virtually from district to district. But, by the same token all of the district courts in the Sixth Circuit *now* are bound to a different rule than that binding all of the district courts in the Second Circuit. Too, these rules involve exceedingly important substantive rights of the Petitioners and all like situated criminal defendants, as well as rights of prosecutors. It is just such confusion as this that resulted from unchallenged and uncorrected divergent interpretations of *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964) and *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961) which led to the deterioration of the law in this area for many years prior to the *Miller* decisions. The same process resulted in the emergence of the unfounded "national" community theory. If vigilance is not exercised, by nipping each divergence in its bud, to insure that never again will there be such an onslaught of confusion in judicial precedent as preceded *Miller*, the same state of chaos in the law could develop. This vigilance could be simply exercised in the instant case by vacating the decision of the Court of Appeals below and remanding the case for reconsideration of the holding in *Heller* v. *New York*, 413 U.S. 483 (1973) in light of *G. I. Distributors, Inc.* v. *Murphy*, 490 F.2d 1167 (2nd Cir., 1973), cert. den. 416 U.S. 939 (1974).

Perhaps this Honorable Court might wish to choose even another alternative. By simply vacating the decision of the Court of Appeals below and remanding the case with instructions to dismiss the appeal and remand to the dis-

trict court with instructions to the district court to dismiss the Complaint, this Honorable Court could accomplish the above goals and preclude the possibility that other aspects of the same case might again unnecessarily clog the appellate process and waste the valuable time of this Court by consideration of a second Petition For Certiorari. Further, this would have the effect of correcting all of the various errors made below at each level.

Finally, neither the Court of Appeals nor the district court below rendered any decision which would preclude the prosecution of the pending conspiracy indictment. Neither did either of the courts below even indicate a leaning toward an erroneous holding that geographically confined local "community" standards were definitional of obscenity. In fact, the inclination of the Court of Appeals' decision seems to be correct on this point. See, *Smith* v. *United States*, ... F.2d ....., CCA #73-2062 (6th Cir., Nov. 13, 1974) and *United States* v. *Carter*, ... F.2d ....., CCA #74-1150 (6th Cir., Nov. 21, 1974). Both of these cases are reported in *Sixth Circuit Review*, December 2, 1974, Vol. 3, No. 20, pp. 5-6. Thus, this Brief speaks to that point only in opposition to the position of Petitioners to demonstrate the correctness of all of the actions taken by Respondent.

In conclusion Petitioners are not entitled to any relief which they seek by their Petition For Certiorari and should be denied same.

Respectfully submitted,

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APPENDIX AA

No. C-72-179

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL ACTION
NO. C-72-179

UNITED STATES OF AMERICA
V.
TWO CARTONS CONTAINING ONE MOTION PICTURE FILM ENTITLED: "School Girl"

ORDER TO SHOW CAUSE

Upon consideration of the Application of the United States of America which has been filed on the 26th day of May 1972, it is hereby

ORDERED that whoever has possession of two (2) cartons containing motion picture film entitled "School Girl" shall appear with said motion picture film before this court on the 11th Floor, Federal Office Building, 167 North Main Street, Memphis, Tennessee, at 9:30 a.m. on the 30th day of May, 1972 and then and there show cause, if any there be, why said motion picture film should not be declared obscene and a search warrant executed authorizing the seizure of said motion picture film. It is

FURTHER ORDERED that the United States Marshal for this District, or his authorized deputy, shall, upon

finding said motion picture film, apply thereto seals to the cartons containing said motion picture film in such a manner that said cartons cannot be opened without breaking said seals. It is

FURTHER ORDERED that said motion picture film shall be brought to this court as above ordered with the seals placed thereon by the United States Marshal, or his authorized deputy, for this District, intact. It is

FURTHER ORDERED that said motion picture film shall not be removed from the Western Judicial District of Tennessee nor in anyway altered or tampered with prior to its being presented to this court as above ordered. It is

FURTHER ORDERED that the United States Marshal for this District, or his authorized deputy, shall personally serve a copy of this Order and the Application For An Order To Show Cause filed herein by the United States on the manager of the Studio Theater, 535 South Highland, Memphis, Tennessee and any other person in whose custody or possession said motion picture film is found. It is

FURTHER ORDERED that the United States Marshal for this District, or his authorized deputy, shall obtain personal service forthwith an attested copy of this Order on the person in charge at Bonded Film Storage Company, Fort Lee, New Jersey. It is

FURTHER ORDERED that if any person or other business entity claims an interest in the possession or control of said motion picture film, said person shall appear before this court at 9:30 a.m. on the 30 day of May, 1972, then and there prepared to show cause, if any there be, why said motion picture film should not be subject

to execution of a search warrant authorizing the seizure of said motion picture film.

ENTER May 26, 1972.

/s/ Robert M. McRae, Jr.

APPROVED:

Thomas F. Turley, Jr.
United States Attorney
By /s/ Larry E. Parrish
Larry E. Parrish
Assistant United States Attorney